

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARK A. BARROW</b>	)	
Claimant	)	
VS.	)	
	)	
<b>THE BOEING COMPANY - WICHITA</b>	)	Docket No. 187,971
Respondent	)	
AND	)	
	)	
<b>AETNA CASUALTY &amp; SURETY CO.</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

On September 4, 1996, the application of the Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark on April 2, 1996, came on for oral argument in Wichita, Kansas. Appeals Board member Kenton Wirth has recused himself from this case. The Director of Workers Compensation has appointed Jeff Cooper as Appeals Board Member Pro Tem.

**APPEARANCES**

Claimant appeared not having settled his dispute with respondent and its insurance carrier. Respondent and its insurance carrier appeared by and through their attorney, Boyd A. Byers of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Kurt W. Ratzlaff of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

- (1) What, if any, is the liability of the Kansas Workers Compensation Fund?
- (2) Is the doctrine of Collateral Estoppel applicable to this case?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following finding of facts and conclusions of law:

Claimant, a long-term employee with respondent, has a lengthy list of injuries to his left knee beginning in 1987. Claimant has undergone several surgeries on the knee and has been involved in two prior litigated workers compensation matters both dealing with the left knee. The surgeries and the activities above discussed all occurred prior to the injury date in contention herein of October 13, 1993.

One of claimant's treating physicians, Dr. Duane Murphy, had the opportunity to examine and treat claimant for both his past and current injuries. Dr. Murphy opined that claimant had suffered a 13 percent permanent impairment of function to the left leg but further stated that 10 percent of claimant's impairment was due to his preexisting condition. When claimant and respondent settled this matter, the preexisting 10 percent was taken into consideration and the settlement was for a 3 percent impairment to the left leg.

The history of claimant's ongoing knee problems is well documented. Claimant suffered injury in 1987 followed by surgery with Dr. Worsing. This surgery proved unsuccessful and claimant was referred first to Dr. McQueen and then to Dr. Lesko who performed another surgery finding and repairing claimant's torn meniscus. Following this injury claimant returned to work for respondent. He was placed on restrictions because of his impairment. Boeing filed a Form 88 in 1987, documenting its knowledge of claimant's disability.

Claimant suffered a second unrelated knee injury on January 23, 1989. Dr. Lesko again performed surgery but due to ongoing problems claimant was referred to Dr. Murphy who performed arthroscopic surgery on February 21, 1990. Claimant filed a workers compensation claim against Boeing and settled the matter in 1990. Litigation between respondent and the Fund continued with the Fund being assessed 100 percent of the liability for claimant's second knee injury. That Award was not appealed. Claimant missed nearly two years of work subsequent to the 1989 injury but did ultimately return to work with

respondent with permanent restrictions of minimal squatting per Dr. Murphy's recommendations.

Claimant was able to perform his job without violating his restrictions but suffered an additional injury on October 13, 1993, the injury in question in this matter. Claimant was again treated by Dr. Murphy who performed a fifth knee surgery. Dr. Murphy felt that claimant, with his ongoing knee problems, was predisposed to additional symptoms. When questioned, Dr. Murphy opined that claimant would not have suffered the October 13, 1993, left knee injury and resulting increased impairment but for the preexisting knee problems.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. Buildex, Inc.*, 219 Kan. 485, 548 P. 2d 765 (1976).

K.S.A. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The employer has the burden of proving that it knowingly hired or retained an employee. *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P. 2d 871 (1984).

The Workers Compensation Fund argues that while claimant may have been handicapped in 1989, the passage of time has sufficed to "attenuate claimant's handicap." The Fund bases its argument partially on the fact claimant said his knee was fine and that he was not limited. Dr. Murphy, the treating physician, disagreed. Dr. Murphy felt that claimant's ongoing knee problems clearly predisposed him to ongoing symptomatology and additional injury. It is difficult for the Appeals Board to accept an argument that a worker who has suffered three separate injuries, has undergone five separate surgical procedures all on the same knee, with permanent restrictions and permanent functional disability, is not handicapped as that term is defined in K.S.A. 44-566(b). While claimant may be able to perform the daily activities of his job, his knee would clearly have a detrimental effect upon his ability to obtain or retain employment. The Appeals Board finds, therefore, the respondent has carried its burden of proving that it knowingly hired or retained a handicapped employee prior to claimant's injury date of October 13, 1993.

K.S.A. 44-567(a)(1) provides in part:

"Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund . . . ."

The only medical evidence dealing with whether or not claimant's injury in 1993 was related to his preexisting condition comes from Dr. Murphy, the treating physician. Dr. Murphy found but for claimant's prior knee problems he would not have suffered the injury on October 13, 1993. As such, the Appeals Board is persuaded that the Administrative Law Judge's assessment of 100 percent of the liability against the Kansas Workers Compensation Fund in this instance is proper.

Having so found, the Appeals Board finds the second issue dealing with whether Collateral Estoppel applies in this matter is moot.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated April 2, 1996, should be, and is hereby, fully affirmed and all of the Award is assessed against the Kansas Workers Compensation Fund and none against the respondent.

Fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the Workers Compensation Fund to be paid as follows:

Court Reporting Service	
Deposition of Mark A. Barrow	\$116.75
Ireland Court Reporting, Inc.	
Transcript of Regular Hearing	\$ 82.60
Deposition Services	
Deposition of Duane A. Murphy, M.D.	\$128.00
Barber & Associates	
Transcript of Motion Hearing	\$48.90

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Boyd A. Byers, Wichita, KS  
       Kurt W. Ratzlaff, Wichita, KS  
       John D. Clark, Administrative Law Judge  
       Philip S. Harness, Director